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In The Supreme Court of the United States

McCREARY COUNTY, KENTUCKY; JIMMIE GREENE, as McCreary County Judge Executive; PULASKI COUNTY, KENTUCKY; DARRELL BESHEARS, as Pulaski County Judge Executive,

Petitioners,

v.

ACLU OF KENTUCKY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENTS

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STATEMENT OF THE CASE

In 1999, McCreary County "erected in the McCreary County courthouse a Ten Commandments display," initially consisting of only a "framed copy of one version of the Ten Commandments . . ." [Pet. App. 121a.] It did so pursuant to a fiscal court (county legislature) order, signed by petitioner Jimmie Greene, that "the display be posted in a very high traffic area of the courthouse." [*Id.*]

Similarly, Pulaski County "erected in the Pulaski County courthouse a Ten Commandments display," initially consisting of only a "framed copy of one version of the Ten Commandments . . ." [Pet. App. 144a.] Petitioner Darrell BeShears (the County Judge Executive, or chief executive branch officer) candidly professed his religious purpose in erecting the display: "I've always felt like God comes first, country second and family third." [*See* Joint Appendix (J.A.) 27, #3, Ex. 1 (*News Journal*, July 22, 1999, p.1).][1]

The respondents filed suit on November 18, 1999, contending that the Ten Commandments displays violated the First Amendment's Establishment Clause because they did not serve a secular purpose and had the primary effect of endorsing religion.[2] [J.A. 1 #1, 27 #1.] Within one month after the respondents filed suit, McCreary and

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[1] The Harlan County School District likewise placed stand-alone copies of one version of the Ten Commandments throughout its public school classrooms, *Doe v. Musselman*, 96 F.Supp.2d 667, 671-72 (E.D. Ky. 2000), and the lawsuit challenging the school display was consolidated in the courts below. The school district's petition for review is pending before this Court. *See* No. 03-1698.

[2] The district court held that the individual respondents had standing to bring this suit and that the ACLU of Kentucky had organizational standing. [*See* Pet. App. 116a-118a, 140a-142a.] One respondent in the Pulaski County case, Paul Lee, died during the litigation. [J.A. 37 #39 (Suggestion of Death).]

Pulaski Counties (collectively the Counties) passed resolutions encouraging petitioners Greene and BeShears "to read or post the Ten Commandments as *the* precedent legal code upon which the civil and criminal codes of the Commonwealth of Kentucky are founded . . ." [J.A. 1 #5 Ex. 1, 28 #6 Ex. 1 (emphasis added).] The resolutions cited: the county magistrates' agreement with Judge Roy Moore's arguments (in response to litigation seeking removal of his Ten Commandments courtroom plaque); a Kentucky legislative acknowledgement of "the inseparable connection between the ethical conduct of that legislative body and the Christian principles which permeate our society and its institutions;" and that body's vote to adjourn an ethics session "in remembrance and honor of Jesus Christ, the Prince of Ethics." [*Id.*]

The Counties then modified their Ten Commandments "display[s] to include several other documents," conceding "that they did so in an attempt to bring the display[s] within the parameters of the First Amendment and to insulate themselves from suit." [Pet. App. 120a-121a, 144a-145a.] They also conceded that the displays "purport[ed] to demonstrate America's Christian heritage." [Pet. App. 127a, 151a.] In briefs and at oral argument, the Counties asserted that this Court had "never . . . overruled, limited or even questioned" its finding "as a matter of law, fact and history that America is a 'Christian nation.'" [J.A. 1 #5 at 8-9, 28 #6 at 8-9 (briefs) (citing *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892)); 4 #14, 31 #15 (transcript).][3] "[T]o avoid being misunderstood by anyone," the Counties "want[ed] to be

[3] The quoted language is dictum, of course, not the case's holding. And the case involved statutory construction, not the First Amendment. At issue was whether a statute limiting the hiring of foreign workers barred a church from importing an English pastor. *Church of the Holy Trinity*, 143 U.S. at 458.

extremely clear on [their] right, duty and intent to . . . display the Ten Commandments as *the* central historic legal document of the state . . ." [J.A. 1 #5 at 8-9, 28 #6 at 8-9 (emphasis added) (internal quotation marks omitted).] The modified displays were readily visible to the respondents and to other citizens who used the courthouse to conduct routine civic business. [Pet. App. 121a, 145a.]

Instead of stand-alone copies of the Ten Commandments, the Counties' modified displays contained large copies of the Ten Commandments, with smaller copies of eight other documents to the side of or below the Ten Commandments. The eight documents were an excerpt from the Declaration of Independence, the Preamble to the Constitution of Kentucky, the national motto of "In God We Trust," a page from the Congressional Record declaring 1983 the Year of the Bible, a proclamation by President Lincoln declaring April 30, 1863 a National Day of Prayer and Humiliation, an excerpt from President Lincoln's reading "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible," a proclamation by President Reagan marking 1983 as the year of the Bible, and the Mayflower Compact. [Pet. App. 121a-122a, 145a-146a.] The excerpted portions of documents were selected to include only that document's references to God or the Bible. [*Id.*]

Upon respondents' motion, the district court preliminarily enjoined these modified Ten Commandments displays in May 2000. [J.A. 5 #15, 31 #16.] Finding that the Counties "narrowly tailored [their] selection of foundational documents to incorporate only those with specific references to Christianity and texts that . . . were chosen only for their religious references," the district court deemed the modified displays to have a purpose and effect of endorsing religion. [Pet. App. 129a, 153a.]

Several months later – after filing and dismissing an appeal from the preliminary injunction, obtaining new counsel, and unsuccessfully seeking clarification of the preliminary injunction's scope, – the Counties erected their third Ten Commandments displays. In the interim, they neither repealed nor amended their authorizing resolutions; nor did they pass any other relevant resolution. The sole legislative authorization for the third Ten Commandments displays thus consisted of the December 1999 resolutions, which encouraged petitioners Greene and BeShears "to . . . post the Ten Commandments as the precedent legal code upon which the civil and criminal codes of the Commonwealth of Kentucky are founded . . . ," and cited with approval Judge Roy Moore's arguments, Kentucky's legislative acknowledgement of "the . . . connection between [legislative] . . . ethical conduct . . . and the Christian principles which permeate our society and its institutions," and the legislature's adjournment "in remembrance and honor of Jesus Christ, the Prince of Ethics." [J.A. 1 #5 Ex. 1, 28 #6 Ex. 1.]

This time, instead of surrounding the Ten Commandments with text and excerpts focusing on religion, the Bible or Christianity, the Counties surrounded the Ten Commandments with American (and earlier Colonial and British) political and patriotic texts, song lyrics and a picture – three of which appeared in the second display – and an "explanatory" text. [Pet. App. 97a-98a (detailing contents of displays).] All framed documents were of similar size. The framed copy of the Ten Commandments in each courthouse display contained a Biblical reference, identifying the Ten Commandments as deriving from the

"King James Version" of "Exodus 20:3-17." [*Id.*][4] The explanatory text stated that the "display contains documents that played a significant role in the foundation of our system of law and government." [Pet. App. 179a.] Its full explanation for including the Ten Commandments' was that:

> The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

[Pet. App. 180a.] Upon further motion, the district court supplemented its preliminary injunction to enjoin the third version of the Counties' displays. [Pet. App. 112a-114a.] The court concluded that, "[i]n light of the history" of the Counties' actions and this Court's analysis in *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), the Counties "were not motivated by a secular purpose in posting" their third displays; instead, their "clear" true purpose was "posting the Ten Commandments." [Pet. App. 107a.] The district court also concluded that, "[g]iven the religious nature of this document, placing it among these patriotic and political documents, with no more religious symbols or

[4] The Counties apparently deleted these references after oral argument on the supplemental preliminary injunction motion. [Pet. App. 98a.]

moral codes, imbues it with a national significance constituting endorsement." [Pet. App. 109a (footnote omitted).]

A divided Sixth Circuit panel affirmed, with two judges agreeing that the counties' purpose was primarily religious. [Pet. App. 16a-42a.][5] In addressing whether the predominant purpose for the Counties' displays was religious, the appeals court read *Stone*, 449 U.S. at 42, to require that "a purported historical display must present the Ten Commandments objectively and integrate them with a secular message." In the courthouse context, "[t]he government achieves this goal by ensuring that the symbols, pictures and/or words in the display share a common secular theme or subject matter." [Pet. App. 21a-22a.] And the Court examined three factors "when assessing whether the Ten Commandments have been presented objectively and integrated with a secular message: the content of the displays, the physical setting in which the Ten Commandments are displayed and any changes . . . made to the displays since their inception." [Pet. App. 22a.] The panel found that all three factors – content, context and evolution of the display – showed a predominantly religious purpose. [Pet. App. 27a-42a.]

The full Sixth Circuit denied *en banc* review, with two judges dissenting and two concurring. [Pet. App. 163a-176a.] This Court granted the Counties' petition for a writ of certiorari on October 12, 2004.

[5] One judge also voted to affirm because the displays' primary effect was to endorse religion; one judge declined to reach that issue; one judge voted to reverse. The purpose and effect of the Counties' displays thus were raised and preserved in both courts below.

SUMMARY OF ARGUMENT

Three times in a little more than a year, Pulaski and McCreary counties, Kentucky, erected Ten Commandments displays in highly visible locations in their county courthouses. The courthouses are the seats of all three branches of county government. The third displays, at issue here, contain one Protestant version of the Decalogue, surrounded by political and patriotic texts, song lyrics and a picture. The identical displays are entitled "Foundations of American Law and Government." An explanatory text describes the reason for the Ten Commandments' inclusion: "The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition." The Ten Commandments are also said to "have profoundly influenced the formation of Western legal thought and the formation of our country." The counties' two earlier displays consisted of: a stand-alone copy of the Ten Commandments; and a copy of the Ten Commandments surrounded by documents and textual excerpts focusing on religion, the Bible or Christianity.

The Decalogue expresses religious messages central to Jews and Christians. *Stone v. Graham*, 449 U.S. 39, 41 (1980). Different textual versions reflect deep historical and religious disputes among Christian religions and between Christians and Jews. Displaying one version necessarily favors one religion ver others. And, because the Ten Commandments express religious beliefs that are central only to Jews and Christians, displaying the Decalogue necessarily disfavors those with other religious beliefs or none at all. This the Counties may not do. *See, e.g., Abington Township Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) ("absolut[ely] prohibit[ing]" such favoritism); *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("one

religious denomination cannot be officially preferred over another").

The counties' third Ten Commandments displays violate the First Amendment's Establishment Clause because they have the impermissible purpose and effect of endorsing religion. This Court repeatedly has struck down governmental actions that lacked a sincere secular purpose. *See Stone*, 449 U.S. at 41-42 (rejecting asserted secular purpose for posting Ten Commandments on classroom walls); *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) (rejecting asserted secular purpose for teaching "creation science"); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (rejecting asserted secular purpose for requiring moment of silence). And it has held that courts have a "duty . . . to distinguis[h] a sham secular purpose from a sincere one." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (quotation marks omitted) (brackets supplied in *Santa Fe*); *Aguillard*, 482 U.S. at 586-87 (statement of purpose must be "sincere and not a sham").

The Counties' purpose – to display the Decalogue – is revealed in the litigation history, the content of the display itself and the relevant social context. In this litigation, the Counties have described the Ten Commandments as "*the* precedent legal code of the Commonwealth," as "*the* central historic legal document of the state" and now as "*the* foundation of our legal tradition," providing "*the* moral background of the Declaration of Independence." They have erected displays highlighting the religious nature of the Ten Commandments. They have announced their purpose of demonstrating "America's Christian heritage." They argued to the district court that current law holds "that America is a 'Christian nation.'"

The displays' content also reveals the Counties' purpose. The Counties' articulated purpose before this Court – to "educate about law" and to display "some

documents that played a role in the foundation of our system of law and government" – is a sanitized version of what the displays actually say; and these displays are a toned down version of prior displays. History does not support the displays' assertion that the Ten Commandments provide the foundation of our legal system. On the contrary, the clear historical record is that the Decalogue, while it (like other ancient moral codes) informed our notions of right and wrong, played virtually no role in the drafting or adoption of our nation's founding documents. Nor are the parallels between three Commandments and secular law proof of causation, for those bans on killing, stealing and perjury are universal and existed in English law since before the English were Christianized. Moreover, the Declaration of Independence and the Decalogue address distinct concepts – one, the relation of individuals to a deity and each other, the other, the relation of individuals to government. There is no facial or historical link between the two and the displays themselves offer no evidence to support the Counties' bald assertion that the Decalogue provided the "moral background" for the Declaration.

The displays' content, context and location all lead the reasonable observer to view them as symbolically endorsing religion. *See County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989) (symbolic endorsement violates Establishment Clause). The observer would perceive the displays to assert the central role in our nation's history played by one set of religious beliefs – an assertion that is not borne out by the record and, ultimately, is an assertion of faith itself. The reasonable observer also would understand that, by linking the Decalogue to our nation's founding documents and central precepts, and by trumpeting that link at the seat of all three branches of government, the Counties endorsed the Decalogue.

The Counties' permanent displays of one version of text expressing core religious beliefs of some, but not all, Protestants, and the Counties' assertions that those religious beliefs provided "*the* foundation of our legal tradition" and "*the* moral background of the Declaration of Independence," thus lacks any secular purpose and conveys the Counties' message that it endorses that religious message.

ARGUMENT

I. THE TEN COMMANDMENTS CONTAIN AND EXPRESS A RELIGIOUS MESSAGE.

A. The Ten Commandments Are Inherently Religious.

The Ten Commandments derive from the Torah, Exodus 20 and Deuteronomy 5. Jewish tradition teaches that God gave the Ten Commandments to Moses on Mt. Sinai (about 3200 years ago). For this reason, many Christians and Jews deem the Ten Commandments sacred.[6] Jews deem the Commandments a "statement of faith;" both Jews and Christians deem them a statement of rules. Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 Fordham L. Rev. ___, 2 (forthcoming March 2005) (*Finkelman*).[7] Although the Ten Commandments can be divided into groupings that

[6] There are at least five versions of the Ten Commandments in use by Jews, Catholics and Protestants. (The Counties displayed a Protestant, "King James," version.) *See generally*, Steven Lubet, "The Ten Commandments in Alabama," *Constitutional Commentary*, at 471, 474-75 (1998) (*Lubet*).

[7] The author has furnished counsel with a copy of the manuscript, which is scheduled for publication in March 2005. Because page numbers for the published article are not yet available, we cite here to the manuscript pages.

concern God and those that do not, believers see the Ten Commandments as a unitary document, given to humans by their deity, and held together by their initial pronouncement that "I am the Lord thy God."

This Court already has recognized that the Ten Commandments send a thoroughly religious message. *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam). There, the Court summarily struck down a Kentucky law requiring schools to post copies of the Ten Commandments. Kentucky required that each Ten Commandments display include the following disclaimer: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." Ky. Rev. Stat. § 158.178(2) (1980), quoted in *Stone*, 449 U.S. at 41. This Court was not persuaded by Kentucky's effort at secularization: "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Stone*, 449 U.S. at 41 (footnote omitted). *See also id.*, 449 U.S. at 41-42 ("The Commandments do not confine themselves to arguably secular matters . . . Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.") (footnote and citations omitted). Scholars uniformly confirm what the *Stone* Court found.[8]

[8] Lower court decisions after *Stone* have understood that the Ten Commandments are a religious text. *See Adland v. Russ*, 307 F.3d 471, 480 (6th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 770-71 (7th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002); *Books v. City of Elkhart*, 235 F.3d 292, 302 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001); *Harvey v. Cobb*

(Continued on following page)

The Ten Commandments contain "two main types of *religious* law: those pertaining to the individual's obligations toward God and those pertaining to . . . relations with other people." Baruch J. Schwartz, "Ten Commandments," in *The Oxford Dictionary of the Jewish Religion* (*Oxford*) (emphasis added). The first five commandments, sometimes known as the first "table," concern one's relationship with God.[9] *See* Walter Bruggeman, "Exodus 20:1-17, The Ten Commandments" in 1 *The New Interpreter's Bible: General Articles* 839 (1994) (*New Interpreter's Bible*). They often are grouped as follows:

> *Commandments 1-3*: God's self-identification, followed by commandments against the worship of other gods, idolatry, and the misuse of the divine name (*Ex.* 20:1-7, *Dt.* 5:6-11). *Commandments 4-5*. Positive commands to observe the Sabbath and to honor parents (*Ex.* 20:8-12, *Dt.* 5:12-16).

Walter Harrelson, "Ten Commandments," in 14 *The Encyclopedia of Religion* 395 (1987) (*Encyclopedia*).

The first three commandments "concern seductive ways in which the God of the exodus is diminished or trivialized." *New Interpreter's Bible* at 842. "I am the Lord thy God" is considered by some religions a prefatory statement, by some a separate Commandment, and by others as part of the First Commandment, along with "Thou shalt have no other gods before me." *Compare Oxford* at 684 *with Lubet* at 475. "In its theology, the first striking feature of the Decalogue is its monotheism." L. W. Batten, "Decalogue," in 4 *Encyclopedia of Religion and*

County, 811 F. Supp. 669, 677-78 (N.D. Ga. 1993), *aff'd*, 15 F.3d 1097 (11th Cir.) (table), *cert. denied*, 511 U.S. 1129 (1994).

[9] As detailed in § I.B, the mere numbering of the Commandments reflects a choice among competing religions and versions. Here, we number the Commandments consistent with the Counties' display.

Ethics 517 (1959) (*Religion and Ethics*). "[W]hatever its original meaning, it was ultimately interpreted as an uncompromising prohibition of the worship of any deity other than [Y]ahweh." *Id.* The First Commandment "insists . . . that other gods must receive none of Israel's loyalty or allegiance." *New Interpreter's Bible* at 841. Its concern "is for the priority of God in human experience. . . . God is to be the center, the hub, the core, the compelling focal point of meaning and power around which every individual life and the whole of human society is to be organized." Owen M. Weatherly, *The Ten Commandments in Modern Perspective* (1961), at 12 (*Modern Perspective*). The First Commandment leaves no place for argument about the existence of God, *see id.*, and explicitly prohibits a belief in multiple gods. *See id.* at 14.

The Second Commandment generally is understood as prohibiting idols, images, or other representations of God, "the assignment of theological significance to any element of creation, the investment of ultimacy in what is not ultimate." *New Interpreter's Bible* at 842. Idolatry is deemed "the worst form of sin" because it "arouses the jealousy of [Y]ahweh" and "[h]ating [Y]ahweh is synonymous with idolatry." *Religion and Ethics* at 517. Its concern is "for the true worship of God," *Modern Perspective* at 25, and it "presents God as the Creator and Ruler of the universe who because of his absolute sovereignty is able to deal mercifully and redemptively with man in his moral failure." *Id.* at 37. However, some religions (including Catholicism) do not include the prohibition against "graven images" in their representations of the Ten Commandments. *See Lubet* at 475.

The Third Commandment prohibits the taking of God's name in vain. "It is unanimously agreed that this commandment protects the name of Yahweh from that unlawful use which could take place in the oath, the curse, and in sorcery." J.J. Stamm and M.E. Andrew, *The Ten*

Commandments in Recent Research, 89 (1967). The primary violation "is to make Yahweh (who is an ultimate end) into a means for some other end." *New Interpreter's Bible* at 842. It calls for "sincerity and faithfulness in man's relationship with God," *Modern Perspective* at 39, and "rests squarely on the Hebrew doctrine of man's creation in the image of God." *Id.* at 52-53.

The Ten Commandments also hold a prominent place in Christian and Jewish worship services. *See New Interpreter's Bible* at 853 ("in some older Christian liturgies, the commandments are recited at baptism"); *Encyclopedia of Religion* at 396 ("[t]he Ten Commandments became a fixed part of Christian catechetical practice and worship"); *Dictionary of Jewish Religion* at 684 ("[r]epresentations of the Decalogue are . . . prominently displayed in synagogues . . . and the biblical festival of Shavu'ot became, in rabbinic tradition, a commemoration of the day on which the Decalogue was heard. When the Ten Commandments are recited in the course of the Torah reading, the congregation rises to its feet").

But the Ten Commandments are not universally accepted. They are central only to the Jewish and Christian faiths. They are less significant in Islam and have no role in Eastern religions. *See* Brief of Anti-Defamation League, et al., as *Amici Curiae* (ADL Br.) at 10; *see also Finkelman* at 2 ("[T]he Commandments have no place at all in Hinduism, Buddhism, Taoism, or other non-western faiths. Moslems consider the Jewish Bible to be a holy text, and thus the Ten Commandments may have some religious value, but are clearly not central to the faith.") They are not a generic invocation of a deity, but "are clearly religious and sectarian." *Id.* Government promulgation of the Ten Commandments thus necessarily prefers Judaism and Christianity over other religious traditions. *See County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 615 (1989) (Blackmun, J., concurring) (First

Amendment prohibits endorsement of two religions no less than endorsement of one).

B. Because Textual Variations Reflect Deep Religious and Historical Disputes, The Counties' Selection Of One Version Of The Ten Commandments Constitutes A Sectarian Choice.

The Counties chose to display text, not mere symbols (such as Moses carrying stone tablets or tablets containing Roman numerals I through X). Choices matter. Symbols express universal themes. Subtlety and understatement expands the interpretive possibilities; explication limits it.

The depiction of Moses carrying two stone tablets on this Court's frieze thus differs materially from the Counties' displays. The frieze is allegorical, symbolic; the text is explicit, precise (and chosen among competing options). The frieze is seen at a distance; the framed text can (and is meant to) be read up close. The frieze is part of a broad display of comparable historical figures, lawgivers; the text is not.[10]

Artistic depictions of the Ten Commandments as symbols thus face no threat here. The Counties' display of Biblical text surrounded by political and patriotic documents is unlike courthouse murals, sculptures and carvings. Those displays of tablets, tablets held by Moses, tablets with Roman numerals, or tablets with Hebrew or English writing, must be gauged in context.[11] Petitioners never have argued that every depiction or use of the Ten Commandments is unlawful. Indeed, *Stone* forecloses that

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[10] We address whether documents surrounding the Ten Commandments secularize the display in § II.B.2.

[11] We express no view about the constitutionality of any particular artistic display.

argument. *Id.*, 449 U.S. at 42 ("This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like"). The States thus are quite wrong to suggest that affirmance here will require removal of John LaFarge murals and ornamental friezes. *See* Brief of the States of Minnesota, et al., as *Amici Curiae* at 2-4, 9-11; *see also* Brief of American Center for Law and Justice as *Amicus Curiae* at 15 (describing Supreme Court frieze as "acceptable accommodation . . . of a religious . . . display"); Brief of the States of Alabama, et al., as *Amici Curiae* at 4-7 (describing various displays). On the contrary, as Justice Stevens explained:

> . . . [A] carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law. The addition of carvings depicting Confucius and Mohammed may honor religion, or particular religions, to an extent that the First Amendment does not tolerate any more than it does "the permanent erection of a large Latin cross on the roof of city hall." . . . Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three religious leaders, however, signals respect not for great proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom, as it would be to exclude religious paintings by Italian Renaissance masters from a public museum.

Allegheny, 492 U.S. at 652-53 (Stevens, J., concurring) (footnote and internal citations omitted).

It is "quite impossible to have a theologically 'neutral' version of the Ten Commandments." *Finkelman* at 18.

In choosing to display text, the Counties had to select among competing religions' versions of the Ten Commandments. The Counties repeatedly chose a Protestant "King James" version – and, until nearly the end of litigation in the district court, said so expressly in their displays.[12] [*See* Pet. App. 98a.] The choice of text displayed created a denominational preference because "there are at least five distinctive versions of the Decalogue. In some cases differences among them might seem trivial or semantic, but lurking behind the disparate accounts are deep theological disputes." *Lubet* at 474 (footnote omitted); *Finkelman* at 7 (identifying "at least four separate versions of the Ten Commandments: Jewish, Catholic, Lutheran, and general Protestant") (footnote omitted); *see also* ADL Br. at 11-18 (detailing how Ten Commandments have been historical source of tension between Jews and Christians); *id.* at 18-21 (describing "Judeo-Christian tradition" as 20th Century concept that "masks an assimilation of minority Jewish and Catholic religious practices into the general American Protestant ethos").

For example, the First Commandment for Jews is "I the Lord am your God, who brought you out of the land of Egypt, the house of bondage; You shall have no other gods besides Me." *Exodus* 20:1 (translation found in W. Gunther Plaut, ed., *The Torah: A Modern Commentary* (1981)). It is a statement of faith, identifying the God who brought the Israelites out of Egypt. *Finkelman* at 11. It can apply only

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[12] The petitioners are "baffl[ed]" how the Ten Commandments can be an active symbol of religion while a crèche is not. Pet. Br. at 12. Both the crèche and the Ten Commandments convey a religious message that the government is barred from communicating except in certain circumstances, where the larger context dispels any message of religious endorsement. By referring to the Ten Commandments as "active," the Sixth Circuit was simply indicating that the displays' explicit text eliminates any ambiguity about its religious message.

to Jews, so no Christian version includes it. *Id.* Some versions deem the first phrase as introductory to the Commandments themselves; only the last portion appeared in the Counties' displays. [*See* Pet. App. 189a ("Thou shalt have no other gods before me").] The Counties' displays thus deleted a central component of the Torah version – the emphasis on God's covenant with the people of Israel. *See* ADL Br. at 9.

The prohibition against graven images, of great importance to some denominations, *see Modern Perspective* at 25-38, is a Commandment "not found anywhere in the version used in the standard Catholic catechism," which splits the Tenth Commandment in two to take its place. *Lubet* at 475. Inclusion of this prohibition "reflects ideological and theological aspects of Protestant reformation in most of Europe." *Finkelman* at 12.[13] The Counties' displays reflect "mainstream Protestant theology." *Id.* Similarly, the Catholic version has "Honor your mother and father" as the Fourth Commandment, while the Protestant and Jewish versions have "Remember the Sabbath and keep it holy." *See* Rob Boston, *The Ten Commandments: A Sequel*, Church & State 10 (July/August 2001). In each case, the Counties have chosen the Protestant version over the Catholic version.

[13] Catholic and Protestant theological differences are reflected in translations too. The King James version of the Bible translates the fourth verse of Exodus 20 as "Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth." *Finkelman* at 20. The Catholic *New American Bible*, on the other hand, translates the verse as "You shall not carve idols for yourselves in the shape of anything in the sky above or on the earth below or in the waters beneath the earth." *Id.* The difference is one of substance, not just semantics. The Protestant version bars graven images *and* images of water, land or sky animals. The Catholic version bars only images *of* those animals. *Id.* 20-21.

Even the phrase "Thou Shalt Not Kill" expresses a denominational preference because "[t]hat is not what the text says in the original Hebrew;" it says "Thou shalt not murder." *Harvey*, 811 F. Supp. at 672, *aff'd*, 15 F.3d 1097 (11th Cir. 1994) (table), *cert. denied*, 511 U.S. 1129 (1994) (quoting testimony of Rabbi Shalom Lewis) (internal quotation marks omitted). The difference may seem minor, but the difference between "kill" and "murder" has important theological implications. *See, e.g., Modern Perspective* at 92 ("Thou shalt not kill" bars capital punishment); *id.* at 97 ("Thou shalt not kill" bars war); *see also Finkelman* at 22 (the pacifist beliefs of denominations such as Quakers and Mennonites stem from this translation). By labeling the display "The Ten Commandments," the Counties have chosen one Protestant version as correct and rejected Jewish and Catholic versions as incorrect.

In choosing to display a version of the Ten Commandments, the Counties took sides in longstanding theological debates. *See Stone v. Graham*, 599 S.W.2d 157, 160 (Ky. 1980), *rev'd*, 449 U.S. 39 (1980) (Lukowsky, J., dissenting) (discussing "the dissension which arose when the Superintendent of Public Instruction invited a committee of various religious leaders . . . to decide what should be the 'official' language of the Ten Commandments to be printed. . . . The Commonwealth admitted at oral argument that this group was unable to agree."). Because of the deep theological differences underlying them, "the different rendering of the Ten Commandments is used as ammunition in . . . classic religious assault[s]." *Lubet* at 476 (providing examples). Simply put, the Ten Commandments are not "a universally accepted list of 'dos and don'ts' . . ." *Finkelman* at 9.

The specific wording in the Counties' displays prefers certain religious sects in other ways. *See Larson v. Valente*, 456 U.S. 228, 244 (1982) ("[t]he clearest command of the Establishment Clause is that one religious denomination

cannot be officially preferred over another"). By explicitly asserting the existence of a God, the display endorses theistic sects over non-theistic sects (such as Buddhism). *See, e.g., Lee v. Weisman*, 505 U.S. 577, 617 (1992) (Souter, J., concurring) ("Many Americans who consider themselves religious are not theistic"). By using the singular "I am the Lord thy God," the displays exclude polytheistic sects, such as Hinduism. *See, e.g.*, 4 *Religion and Ethics* 517 ("in its theology the first striking feature of the Decalogue is its monotheism"). By using the masculine God over the feminine Goddess, the displays embody a particular conception of the ultimate nature of the deity. "The Ten Commandments are more than just symbolic, they are explicit textual references to [religious] beliefs. Unlike other symbolic or pictorial displays (such as a creche or Christmas tree) with possible religious connotations, the text of the Ten Commandments harbors deeper and more explicit meanings." Brian T. Coolidge, *From Mount Sinai to the Courtroom: Why Courtroom Displays of the Ten Commandments and Other Religious Texts Violate the Establishment Clause*, 39 S. Tex. L. Rev. 101, 116 (1997) (footnotes omitted).

Even if one were to ignore the significant theological differences among Ten Commandments versions, "[t]he simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone." *Allegheny*, 492 U.S. at 614-15 (Blackmun, J., concurring) (footnote omitted). The Counties' displays give particular preference to some religions and not to others. Moreover, because "[a]n unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands," *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 786 (1995) (Souter, J., concurring), any reasonable observer will understand that the Ten Commandments displays appear on the courthouse walls with

governmental approval. *See* Brief of Baptist Joint Committee, et al., as *Amici Curiae* (BJC Br.) at 2-3 (arguing that the Counties presumably endorse what they display).

II. INCLUSION OF THE TEN COMMANDMENTS IN THE COUNTIES' COURTHOUSE DISPLAYS HAS THE IMPERMISSIBLE PURPOSE AND EFFECT OF ENDORSING RELIGION.

A. The Counties' First And Second Displays Were Plainly Unconstitutional.

"The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief," *Allegheny*, 492 U.S. at 593-94, or from "making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

To survive scrutiny, publicly displayed religious text must not have "the purpose or effect of 'endorsing' religion." *County of Allegheny*, 492 U.S. at 592 (citing *Engel v. Vitale*, 370 U.S. 421 (1962)); *see also Santa Fe*, 530 U.S. at 301-02 (asking whether schools endorsed religion by permitting student-led prayer before high school football games). The endorsement test, which modifies the original *Lemon* test, *see Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), prohibits governmental "endorsement or disapproval" of religion. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).[14]

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[14] *Lemon* asked whether challenged governmental activity had a secular purpose, had an effect that furthered or inhibited religion, or had excessive entanglement. *Id.*, 403 U.S. at 612-13. The endorsement test asks whether the activity has the purpose or effect of endorsing religion. *See, e.g., Wallace*, 472 U.S. at 69 (endorsement "requires courts to examine whether government's purpose is to endorse religion and

(Continued on following page)

> Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.

Id.

The Counties' first two displays plainly were unconstitutional. The first displays consisted of a Protestant version of the Ten Commandments, hanging alone and readily visible on the courthouse wall. It was worse than the freestanding display struck down in *Stone* because it lacked that display's disclaimer. The disclaimer at least purported to assert a secular purpose for the display: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." Ky. Rev. Stat. § 158.178(2) (1980), quoted in *Stone*, 449 U.S. at 41.

This Court deemed the disclaimer insufficient to show a secular purpose and summarily declared that the display violated the First Amendment. "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Stone*, 449 U.S. at 41 (footnote omitted). Whatever the government's stated purpose, this Court understood the true purpose of posting the Ten Commandments on walls:

> Posting of religious texts on the wall serves no [purported] educational function. If the posted copies of the Ten Commandments are to have

whether the statute actually conveys a message of endorsement") (O'Connor, J., concurring).

> any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

Id., 449 U.S. at 42. Substitute citizens for schoolchildren,[15] delete the purported educational purpose, and the *Stone* display becomes the Counties' first displays.

The Counties' second displays were even worse. The Counties announced a purpose that was unabashedly religious: demonstrating "America's Christian heritage." [Pet. App. 127a, 151a.] They felt free to do so because they read current law to hold "that America is a 'Christian nation.'" [J.A. 1 #5 at 8-9, 28 #6 at 8-9 (citing *Church of the Holy Trinity*, 143 U.S. at 471 (1892)).] They proclaimed the Ten Commandments "as *the* central historic legal document of the state . . ." [J.A. 1 #5 at 8-9, 28 #6 at 8-9 (emphasis added).] And they erected a display that highlighted the religious nature of the Ten Commandments: a large framed copy of the Decalogue accompanied by smaller copies of documents and excerpts selected to include only references to God or the Bible. [Pet. App. 121a-122a, 145a-146a.]

The district court rightly and easily deemed the second displays to have the purpose and effect of endorsing religion and preliminarily enjoined their continued posting. [J.A. 5 #15, 31 #16.] Nor do the petitioners appear to quarrel with the conclusion that the second displays violated the Establishment Clause. They abandoned their

[15] Although this Court has been "particularly vigilant" in monitoring Establishment Clause compliance in the schools, *Aguillard*, 482 U.S. at 583-84, it never has limited application of Establishment Clause principles to the school setting. *See, e.g.*, *Allegheny*, 492 U.S. 573; *Capital Square Review & Adv. Bd. v. Pinette*, 515 U.S. 753 (1995).

appeals from the preliminary injunctions. [J.A. 11 #39; 37 #40.] They make no effort to defend those displays in their merits brief. Indeed, they strive to distance themselves from their earlier displays:

> The [Sixth Circuit] used the prior displays to "taint" the [current display]. . . . The [current display] is unlike any prior display. The [current display] is not devoid of a secular purpose. Even if Petitioners were deemed to have begun with a wholly religious purpose, they did not end with one. The [current display] itself is more relevant to purpose than shadows of the past . . .

Pet. Br. at 13.

No court ever has upheld a display like the Counties' second displays. No one here argues that those displays were constitutional. Thus, while courts have disagreed about the Eagles monuments at issue in *Van Orden*, *compare Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), *cert. granted* (Oct. 12, 2004), *with Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003), and the displays at issue here, *compare ACLU of Kentucky v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted* (Oct. 12, 2004), *with ACLU of Kentucky v. Mercer County*, 240 F. Supp. 2d 623 (E.D. Ky. 2003), *appeal pending*, there can be no serious question that the Counties' earlier displays were patently unconstitutional.

B. The Counties' Third Displays Failed To Cure Their Earlier Establishment Clause Violations.

1. The litigation history, displays' content and social facts all show that the Counties lacked a sincere secular purpose.

Where "a governmental intention to promote religion is clear," *Aguillard*, 482 U.S. at 585, this Court has not

hesitated to hold the challenged conduct unconstitutional. Thus, the Court has invalidated Louisiana's creationism statute, *Aguillard*; struck down a Kentucky law requiring the posting of the Ten Commandments in public schools, *Stone*, 449 U.S. 39; struck down Alabama's moment of silence statute, *Wallace*, 472 U.S. 38; invalidated student-led prayer at high school football games, *Santa Fe*, 530 U.S. 290; and held unconstitutional the mandated daily reading of Bible verses and the Lord's Prayer in public schools. *Schempp*, 374 U.S. 203. In each case, this Court held that the challenged conduct was motivated by a religious purpose, and rejected the government's assertion of a sincere nonreligious purpose.

Nor is the requirement of a secular purpose "satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring). While a government's professed secular purpose for an arguably religious policy is entitled to "some deference," it is "the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'" *Santa Fe*, 530 U.S. at 308 (quoting *Wallace*, 472 U.S. at 75) (brackets supplied in *Santa Fe*); *Aguillard*, 482 U.S. at 586-87 (statement of purpose must be "sincere and not a sham"). The secular purpose requirement thus "aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987).

Distinguishing a sham secular purpose from a sincere one requires "examination of the circumstances surrounding [the governmental] enactment." *Santa Fe*, 530 U.S. at 315. Judicial assessment of governmental purpose is largely "a legal question to be answered on the basis of judicial interpretation of social facts . . . Every government

practice must be judged in its unique circumstances . . ." *Lynch*, 465 U.S. at 693-94 (O'Connor, J., concurring). The Court "need not be blind . . . to the [governments'] religious purpose . . ." *Aguillard*, 482 U.S. at 590.

In these unique circumstances, there are three reasons for concluding that the Counties' third Ten Commandments displays lacked a sincere secular purpose. First, the litigation history undermines the Counties' credibility. Second, the displays' content is inconsistent with – and thus cannot "serve" – the Counties' professed secular purpose. Third, the district court's intimate familiarity with the social facts – especially at this stage of the case[16] – warrants deference to its conclusions here.

a. The litigation history.

Until the last moment, the Counties made no secret of their desire to trumpet Christian heritage by displaying the Ten Commandments. They first posted stand-alone copies of the Ten Commandments, with one petitioner declaring that "God comes first." Within one month after the respondents filed suit, the Counties declared the Ten Commandments to be *the* precedent legal code of the Commonwealth of Kentucky, applauded Judge Roy Moore's efforts to prevent removal of his Ten Commandments courtroom plaque, and lauded legislative citation of Christian principles and remembrance and honor of Jesus Christ, the "Prince of Ethics."

The Counties' second displays purported to demonstrate America's "Christian heritage." The Counties argued that, under current law, America is a "Christian nation." They proclaimed the Ten Commandments as *the*

[16] The case has proceeded on appeal for three and a half years from a supplemental preliminary injunction. Throughout much of the litigation, the trial court has stayed proceedings on petitioners' motion (and over respondents' objections). [*See* J.A. 22, #78, 24 #87.]

central historic legal document of the state and, for that reason, wanted to be "extremely clear" that they asserted the right, duty and intent to display the Commandments. They did so by surrounding large copies of the Ten Commandments with smaller copies of other documents and excerpts selected only for their religious references.

The Counties then hired new lawyers.

Within months, the same elected officials of the same Counties erected toned-down Ten Commandments displays. This time, they announced that the Ten Commandments "provide *the* moral background of the Declaration of Independence" and "*the* foundation of our legal tradition." (Emphasis added.) The displays asserted that the equal-sized framed documents, including the Ten Commandments, "played a *significant* role in the foundation of our system of law and government." (Emphasis added.)

This litigation history thus mirrors *Santa Fe*. There, school policy had the student council chaplain deliver a prayer over the public address system before each varsity football game. *Id.*, 530 U.S. at 294. After parents and students filed suit challenging the practice, the schools adopted a policy containing alternative provisions: one permitted students to opt for pregame prayer, *id.*, 530 U.S. at 297-98; the other permitted students to opt for nonsectarian, nonproselytizing, pregame prayer. *Id.* The latter provision would go into effect only if a court enjoined the former. *Id.* The schools then adopted a final policy substituting "messages," "statements" and "invocations" for "prayer." *Id.*, 530 U.S. at 298. The validity of only final policy was before the Court. *Id.*

The schools identified the secular reasons for the policy as "foster[ing] free expression of private persons[,] . . . solemniz[ing] sporting events, promot[ing] good sportsmanship and student safety, and establish[ing] an appropriate environment for competition." *Id.*, 530 U.S. at 309 (quoting

from merits brief). While those purposes are facially secular, deference did not require the Court to take them at face value. Rather, the Court noted that an "invocatio[n] is not necessary to further any of these purposes" and that the "policy does little to foster free expression." *Id.* (internal quotation marks omitted). The Court found "[m]ost striking" the policy's "evolution . . . from . . . 'Student Chaplain' to the candidly titled 'Prayer at Football Games' regulation." *Id.* This "history indicates that the [schools] intended to preserve the practice of prayer before football games." *Id.*

Santa Fe came to the Court "as the latest step in developing litigation . . ." *Id.*, 530 U.S. at 315. The "narrow question" was whether implementation of the final policy "insulates the continuation of [pregame] prayers from constitutional scrutiny." *Id.* Because "inquiry into this question not only can, but must, include an examination of the circumstances surrounding its enactment," *id.*, the Court held that "[i]t d[id] not."

Here too, the petitioners seek to avoid scrutiny of anything other than their final asserted purpose. But because the third displays are "the latest step in developing litigation," they cannot "insulate the continuation of [Ten Commandments displays] from constitutional scrutiny." *Id.* Moreover, posting the Ten Commandments is not necessary to further the Counties' asserted secular purpose of "educat[ing] about law," or about "some documents that played a role in the foundation of our system of law and government." Pet. Br. at 5, 9.

The district and circuit courts rightly understood that the third displays were the latest in a logically-connected series with one common purpose: posting the Ten Commandments at the seat of (all three branches of) the Counties' government. The Counties were willing, if necessary, to eliminate the size difference between the Ten

Commandments and surrounding documents; they were willing, if necessary, to surround the Ten Commandments with religiously-neutral documents.[17] But they were unwilling to significantly alter their characterization of the debt America's civil government owed to these core religious beliefs. Kentucky's assertion in *Stone* that the Ten Commandments had been adopted "as the fundamental legal code of Western Civilization and the Common Law of the United States" became, twenty years later, the Counties' assertions that the Ten Commandments were "the precedent legal code of the Commonwealth of Kentucky," then the "central historic legal document of the state," and finally "the foundation of our legal tradition," providing "the moral background of the Declaration of Independence."

In rejecting the Counties' professed secular purpose, the district and circuit courts properly fulfilled their "duty . . . to distinguish a sham secular purpose from a sincere one." *Santa Fe*, 530 U.S. at 308 (quoting *Wallace*, 472 U.S. at 75) (brackets and internal quotation marks omitted). They did not – as the petitioners and several of their *amici* argue, *see, e.g.*, Pet. Br. at 13-14, Brief of the United States as *Amicus Curiae* (U.S. Br.) at 25, Brief of Thomas More Law Center as *Amicus Curiae* at 6 – deem prior unconstitutional displays to permanently and irrevocably "taint" future displays. On the contrary, the lower courts took the Counties' earlier articulated purposes into account in assessing whether the latest – supposedly secular – purpose was a sham. And this Court's cases require them to do so. *See, e.g., Santa Fe*, 530 U.S. at 308, 315; *Wallace*, 472 U.S. at 75; *Aguillard*, 482 U.S. at 586-87, 590.

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[17] Several of the documents refer formalistically to God. Respondents do not assert that those references convert the political documents into religious ones.

b. Content.

The displays are not an "integrated . . . curriculum," *Stone*, 449 U.S. at 42, but a grab-bag of loosely related political and patriotic items – except for the Ten Commandments, which are an explicitly religious text. Petitioners assert that the display's purpose is to "educate about law," or about "some documents that played a role in the foundation of our system of law and government." Pet. Br. at 5, 9. For the reasons detailed below, petitioners' assertions about the Ten Commandments' foundational role are wildly exaggerated, requiring a leap of religious faith in the absence of historical support. But the content reveals more: because the displays rest on the fundamentally flawed premise that the Ten Commandments provide *the* moral background of the Declaration of Independence and *the* foundation of our legal tradition, the displays' content reinforces the conclusion drawn from the litigation history – that the Counties' asserted secular purpose is a sham.[18] The absence of historical support about the Ten Commandments' central role thus is relevant both to the displays' purposes and their effect; it further undercuts the Counties' claims in context.

Petitioners now seek to distance themselves from the displays' exaggerations. Where the displays assert that the Ten Commandments provide *the* moral background of the Declaration of Independence, the petitioners now say that some of the Commandments "are compatible with" the Declaration's unalienable rights. Pet. Br. at 10 n.7. Where

[18] The Counties also chose to capitalize the word "Lord" four times (and no other word), thus emphasizing the religious aspects of the Ten Commandments. [*See* Pet. App. at 189a.] By visually highlighting religious over secular terms, the displays undercut any claim to commemorate the Ten Commandments' foundational secular influence.

the displays assert that the Ten Commandments provide the foundation of our legal tradition, the petitioners now say that the Counties' factual claims "need not be accurate." *Id.* at 10.

The United States similarly seeks to avoid any scrutiny of the displays' accuracy, *see* U.S. Br. at 17-24, saying that a display's "uncommonly silly" or "disunified" content does not establish religion, *id.* at 21 n.11, and that a "thematically disjointed" or "muddle[d]" display may be lawful. *Id.* at 29.[19] True enough. But review of a display's factual accuracy (or even plausibility) is essential to discern whether government has a sincere or sham purpose for displaying *religious* text. Otherwise, no display would be subject to judicial scrutiny; *Santa Fe*'s "duty" would be illusory. It is the *petitioners*, after all, who assert a common link connecting the displays' elements. And it is the *petitioners* who assert that the common link provides a secular reason to include the Ten Commandments. Courts cannot gauge sincerity of purpose if those assertions are insulated from review. *See Aguillard*, 482 U.S. at 586-89 (to gauge whether purported secular purpose of enhancing academic freedom was sincere, Court evaluated effect of

[19] The Counties' displays are "uncommonly silly" in ways unrelated to the Ten Commandments. They assert that "The Star-Spangled Banner" "became a rallying cry for the American Patriots during the Revolutionary War," even though Francis Scott Key wrote the song three decades later. [Pet. App. 181a-182a.] And they assert that items (erroneously described as documents) celebrating America – a picture (of Lady Justice) and a song ("The Star Spangled Banner") – somehow "played a significant role in the *foundation* of our system of law and government." [Pet. App. 179a (emphasis added).] The point is not to quibble with details; rather, the displays' sloppiness undermines its purported secular intent to "educate," suggesting that the display was hastily assembled in an effort to once more place the Ten Commandments on the courthouse walls.

statute requiring teaching of creation science along with teaching of evolution); *Santa Fe*, 530 U.S. at 315.

The displays' factual assertions about the Ten Commandments' "profound influence" on Western legal thought and America's formation, and their provision of the "moral background" for the Declaration of Independence, are demonstrably false. Scholars have concluded that these assertions do not survive careful scrutiny – that there is no basis for singling out the Ten Commandments' influence on Western legal thought or linking it to the Declaration of Independence. *See* Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J.L. & Religion 525 (2000) (*Green*); *Finkelman*. On the contrary, the historical record reveals that: the influences on early American law are largely secular; any early religious influences declined during the nation's founding; the American government's central founding documents have nothing to do with the Commandments; and, to the extent that the Ten Commandments' non-religious precepts are consistent with current law, those precepts are universal (and even predate the Ten Commandments).

American law derives from broad and varied sources, including: the common and statutory law of England; English equity, chancery, ecclesiastical and other non-common law courts; Roman, continental European and Germanic tribal law. *See Green* at 536-37; *Finkelman* at 26; Lawrence M. Friedman, *A History of American Law*, 2d ed. 33-104 (1985); Richard B. Morris, *Studies in the History of American Law*, 2d ed. (1974); Michael Hoeflich, "Relationships Among Roman Law, Common Law, and Modern Civil Law: Roman Law in American Legal Culture," 66 Tulane R. Rev. 1723 (1992). "[E]arly American law was an amalgam of British common law, legal reform impulses, and practical responses to the frontier situation facing the settlers." *Green* at 537.

Many deem the Magna Carta to be the earliest source of modern English and American law. *See* Bernard Bailyn, *The Ideological Origins of the American Revolution*, 22-54 (1967). It and the 1689 English Bill of Rights influenced the American colonialists enormously. *Finkelman* at 26. The Magna Carta, written in 1215, contained core due process principles. The English Bill of Rights subjected the Crown to the laws of Parliament and established British citizens' rights to freedom of speech and jury trial, and freedom from cruel and unusual punishment or excessive fines and bail.[20] Neither the Magna Carta nor the English Bill of Rights mentions the Ten Commandments, nor any individual Commandment. Other than formalistic references to "God," bearing no relation to the documents' substantive provisions, neither document mentions religious principles. *See*, *generally*, Neil H. Cogan, ed., *Contexts of the Constitution* 657-66, 686-92 (1999).

The secular writings of Enlightenment thinkers such as John Locke, author of *Second Treatise on Government* (1690), John Trenchard and Thomas Gordon, the authors of *Cato's Letters* (1720-23), and other English libertarian thinkers also heavily influenced the framers. *Finkelman* at 26. Indeed, "[t]he influence of Locke and other Enlightenment thinkers on late colonial attitudes toward the law

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[20] The concessions granted by King John in the Magna Carta largely applied only to the baronial families atop the feudal system. *Finkelman* at 27. In the early seventeenth century, Sir Edward Coke successfully argued for their expansion to all British people, leading ultimately to the 1689 English Bill of Rights. "When American colonists spoke of their 'rights as Englishmen,' . . . they had in mind, among other things, the rights and privileges found in the Magna Carta . . . ," *id.* at 28, and later "the protections set out in the English Bill of Rights . . ." *Id.*

cannot be overstated." *Green* at 545. Thus, "[w]hile English law had some Biblical roots, by the time of the American settlement . . . the Bible and religious issues had long been surpassed by more practical concerns, especially in the American colonies." *Id.* at 26.

The Bible was one of many sources influencing the development of early colonial law, particularly in the four New England colonies of Plymouth, Massachusetts Bay, Connecticut and New Haven, and particularly between 1620 and the 1680s. *Finkelman* at 30; *Green* at 537. *See* Bradley Chapin, *Criminal Justice in Colonial America, 1606-1660*, 4-15 (1983) (*Chapin*); George Lee Haskins, *Law and Authority in Early Massachusetts*, 136-37, 141-162 (1960). Even there, however, the Bible as a whole, not the Ten Commandments themselves, influenced colonial law. *Haskins*, at 136-37.

By contrast, Rhode Island – which Roger Williams founded after his exile from Massachusetts Bay, in part because he refused to accept the religious aspects of the colony's legal culture – explicitly rejected Bible-based codes. *Green* at 542; *Finkelman* at 30. And Biblical influence was far less in the non-Puritan colonies. Virginia, the oldest and most important British colony, quickly ended an effort at a Decalogue-based system and resorted to common law. *Green* at 542; *see* Perry Miller, "Religion and Society in the Early Literature of Virginia," in Perry Miller, *Errand into the Wilderness* 99-140 (1956); *Chapin* at 4-15; Arthur P. Scott, *Criminal Law in Colonial Virginia* 3-38 (1930). Pennsylvania and New York applied secular common law. *Green* at 542. Indeed, "both Puritans and non-Puritans alike viewed their biblically based legal codes as distinct from, and at times in tension with, the secular common law." *Green* at 537 (citing *Chapin* at 4-15; Rosezella Canty-Letsome, *John Winthrop's Concept of Law*

in 17th Century New England, One Notion of Puritan Thinking, 16 Duquesne L. Rev. 331, 350-51 (1977-78); *see also Green* at 542 ("the New England codes, with their express reliance on the Pentateuch and Decalogue, were viewed as alternatives to the common law").

Ultimately, then, the vast majority of colonial law (and their English sources) developed apart from the Ten Commandments. Only a small portion of colonial laws, such as the Puritan Codes, derived from the Bible generally, and an even smaller portion directly paralleled the Ten Commandments.[21] And the Puritan colonies' experiences – including Massachusetts Bay's Salem Witch trials – had illustrated the dangers of a religion-based legal system. *Finkelman* at 35. As a result, then, many of the core protections in our Bill of Rights, including freedom of religion, reflect a reaction to the excesses of the Puritan Codes, not an endorsement of them. *Id.*; *see generally, Green* at 537, 542-43.

Religious influences diminished further during the founding era. A "developing market economy, dependent on trade with England and between the colonies, required a more formalized legal system," with consistent rules based on British common law. *Green* at 543 (citing Kermit L. Hall, *The Magic Mirror: Law in American History* 22-23 (1989); Morris, *Studies in the History of American Law* at 62-64; Friedman, *History of American Law* at 48-49, 80). The founders did not see law as biblically-based, but as "a repository of human experience, embodying concepts of justice, equity, and the rule of law, not as representing

[21] Even in Massachusetts, biblical law diminished in influence well before the Revolution. After 1691, the laws of the colony, and later the state, "were essentially secular, based primarily on English law, indigenous law, and local custom. *Finkelman* at 30.

divine principles." *Green* at 545. American revolutionaries cited the Magna Carta and secular authorities such as William Blackstone's *Commentaries on the Laws of England* in their struggles. Blackstone's *Commentaries*, written in the 1760s, contain no reference to the Ten Commandments (although they do refer to "God"); instead, the legal system he described is secular.

The framers widely read and were deeply influenced by Enlightenment thinkers. *Green* at 544; *Finkelman* at 26; *see* Bailyn, *Ideological Origins* at 35-54; Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, 291-305 (1969). Historians and scholars deem these sources to be ideologically central to the nation's founding, highly influential on the legal and political documents of the founding era, including the Declaration of Independence, the United States Constitution and the American Bill of Rights. *See* Bailyn, at 22-54. The Declaration contains formalistic prefatory references to the "Laws of Nature and of Nature's God," and to a "Creator." *See Finkelman* at 36. The Constitution and Bill of Rights do not even contain these references. But beyond those formalistic references, none of these documents pertains to biblical law or the Ten Commandments. Rather than relying on divine authority, the Constitution is "ordained" by "the People of the United States." *See id.* at 36-37. "The foundation of the law of the United States thus emanates from the nature of representative government – what Jefferson called 'the consent of the governed' – and needs no external or divine authority for its support." *Finkelman* at 37-38; *see generally* Isaac Kramnick and R. Laurence Moore, *The Godless Constitution* 26-45 (1996).

In light of this, it is no surprise that neither the Ten Commandments nor biblical law get mentioned anywhere

in the debates and publications surrounding the founding documents. The wide-ranging debates were reprinted in Madison's *Notes*, the *Annals of Congress*, Farrand's *Records*, Elliot's *Debates*, and elsewhere. In those debates, the founders mentioned Roman, Continental and British law, among others, but – so far as researchers have yet determined – no delegate ever mentioned the Ten Commandments and no delegate ever mentioned the Bible. *Finkelman* at 40. Indeed, the only serious discussion of religion led to the Constitutional provision barring religious tests for office-holding. *Id.* Nor do the Founders' papers contain any statements about the Ten Commandments' legal significance. *Green* at 548 (citing Philip B. Kurland and Ralph Lerner, eds., *The Founders Constitution* (1987)).[22] Moreover, *The Federalist Papers* do not contain any mention of the Bible or the Ten Commandments.

Simply put, the historical record makes clear that the American government was not based on the Ten Commandments and was not "profoundly influenced" by them.[23] Nor does the record contain any hint that the Ten Commandments influenced, or served as the "moral background" for, the Declaration of Independence. As one *amicus* notes, the National Archives' website, "which

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[22] Indeed, a computer search of George Washington's collected papers found no reference to the Ten Commandments. *Green* at 548 n.87 (citing source).

[23] This is not to say that the secular principles contained in the Ten Commandments or other ancient moral codes did not "inform our notions of right and wrong" and thus affect the development of law. *Green* at 525. Of course they did. But influence at that abstract level is far different from the specific assertions contained in the Counties' displays.

describes in great scholarly detail the background, content, and impact of the Charters of Freedom," identifies the foundation of the Declaration of Independence as the "predominantly secular philosophy of the Enlightenment." Brief of Freedom from Religion Foundation as *Amicus Curiae* at 15-16.

Petitioners say only three things to support the displays' historical claims. First, they list colonial laws that reflected or were influenced by the Ten Commandments. *See* Pet. Br. at 22-27. Second, they cite judges and commentators who, in turn, say that the Ten Commandments influenced American law. *Id.* at 11 n.8, 21-22. Third, they cite modern laws that parallel some of the Ten Commandments. *Id.* at 26-27.

None of these will suffice to rebut the actual historical record cited above and detailed in *amici* briefs. As for the colonial laws: To be sure, some colonies enacted Biblical codes – but most did not. Those that did generally tracked broader Biblical principles, not the Ten Commandments. And, in any event, the colonial experiment in Bible-based laws ended before the Revolution and is not reflected in American law.

As for judges and commentators: The cited statements largely build on one another but, traced back to their roots, do not rely on history. *See* Brief of Council for Secular Humanism, et al., as *Amici Curiae* at 9-10. And, as detailed above, history does not support those judicial statements, however well-intentioned they are or intuitive they may seem. After all, "no amount of repetition of historical errors in judicial opinions can make the errors

true." *Wallace*, 472 U.S. at 107 (C.J., Rehnquist, dissenting).[24]

As for parallels between American law and the Ten Commandments: To begin with, the text of the Ten Commandments bears little relation to American law. The first four are religious commands; they could not be part of American law, consistent with the First Amendment. Three others – prohibiting coveting and adultery and requiring that one honor one's parents – generally are not part of American law. The remaining three – prohibiting killing, stealing and perjury – are part of American law, to be sure, but they were common to ancient religious and secular moral codes. They are hardly unique to the Ten Commandments. *See Green* at 525.

The Code of Hammurabi, the earliest compilation of Babylonian law (*circa* 2200 B.C.E.), predated Mosaic law by 1000 years. *The Hammurabi Code* (trans. Chilperic Edwards) (1904), p. 120. Indeed, the Ten Commandments derived from the Code of Hammurabi and two dozen passages in Exodus are substantially identical to sections in the Code of Hammurabi. *Id.* at 123-30. Like the Ten Commandments, the Code of Hammurabi prohibited killing, adultery, stealing, and bearing false witness. *Id.* at 3, 6, 8, 21-22, 129, 153, 206-07, 209-10, 259-60.

Other ancient codes similarly prohibited such things as murder, theft, adultery and perjury. *See The Hittite Laws* (E. Neufeld trans.) (1951) [Cuneiform fragments of Hittite laws written *circa* 1370 B.C.E. prohibit homicide, theft and adultery]; Albert Kocourek & John H. Wigmore,

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[24] Much of the United States' first argument thus rests on unexamined and ultimately flawed history. *See* U.S. Br. at 7-10 (reciting judicial statements about history).

Source of Ancient and Primitive Law 469-99 (1915) [the Laws of Manu (Hindu), created *circa* 1100 B.C.E., prohibited murder, adultery, theft and perjury]; Ilias Arnaoutoglou, *Ancient Greek Laws: A Sourcebook* 22-23, 70-73 (1998) [Athenian law of the 6th Century B.C.E. prohibited adultery, theft, murder and other forms of homicide]; 1 *The Civil Law* 57-77 (S.P. Scot trans.) (1932), 11 *The Civil Law* 29-46 [Roman law prohibited murder, theft, perjury and adultery]; A.F.P. Hails, *Remnants of Ch'in Law* 120-131, 138-40, 146-49, 168-69 (1985) [Ch'in Dynasty, *circa* 7th Century B.C.E., prohibited theft, falsely denouncing someone as a criminal, killing without authorization and adultery]. Nor is it surprising that many moral codes, including those predating the Ten Commandments, contain similar secular rules, because basic prohibitions on murder and stealing are essential elements of any social structure.

Moreover, the displays themselves offer no evidence to support the facially suspect link between the Ten Commandments and Declaration of Independence. The Ten Commandments describe individuals' duties to a deity and, as commanded by that deity, to each other. The Declaration of Independence describes the relationship between individuals and government. Other than the mention of a Creator, no link is apparent and none is described by the displays. What is left is the bald assertion that core religious beliefs "clearly" influenced the Declaration of Independence and "provide[d] the moral background" for it. [Pet. App. at 180a.][25]

[25] The United States chastises the Sixth Circuit for its "insistence on elaborate exegesis." U.S. Br. at 20. But that misses the point. The displays assert a link between the Ten Commandments and Declaration of Independence – indeed, the Declaration's moral debt to the

(Continued on following page)

But history demonstrates that American law is not rooted in the Ten Commandments. And "when issues concern the relationship between church and state, history matters." *Green* at 530-31. American states inherited their prohibitions on murder, theft, perjury and defamation from English law, the earliest surviving sources of which date from the seventh century. *See* Brief of Baptist Joint Committee et al., as *Amici Curiae* in *Van Orden* (BJC *Van Orden* Br.), at 20-21. Those sources, in turn, compiled customs that "had existed among the Germanic tribes before they were written down and before the Anglo-Saxons were Christianized." *Id.* at 21 (footnote omitted). The Ten Commandments are not mentioned *at all* in the standard comprehensive English historical sources. *Id.* at 21-22. They are not mentioned *at all* in this nation's founding documents. They are not mentioned *at all* in the Constitutional debates. "In sum, only three of the Commandments are a significant part of American law, and those three provisions were part of the law of England before England learned of the Commandments." *Id.* at 23.

Finally, even if the historical record were less settled – that is, even if serious scholarly research supported both sides of the argument – the Counties' displays would not serve a secular "educational" purpose. Rather, they would serve the impermissible purpose of "taking sides in a religious controversy." BJC *McCreary* Br. at 9. If the historical record is unclear, the role and influence of the Ten Commandments is debatable. But it is not a debate the government can enter without straying from its

Commandments – that is not apparent from the face of either document (and not supported by historians). Absent more – that is, absent some supporting authority – the Counties effectively ask the reasonable observer to take the link "on faith." *See* BJC Br. in *McCreary* at 8-9, 11.

proper, religiously neutral, role. In the absence of clear, objective, historical evidence about religious history or religion's role in secular events, the Counties' proclamation that the Ten Commandments "profoundly influenced" Western legal thought and the formation of our country, and that the Commandments "provide[d] the moral background" of the Declaration of Independence and the "foundation" of our legal history [Pet. App. 180a], is simply a subjective assessment about the importance of a particular religious faith. Government serves no secular purpose by making that assessment.

c. Social facts.

The district court was uniquely positioned to assess social facts, especially at the preliminary injunction stage. It was best able to gauge the petitioners' ever-changing displays and ever-shifting legal rationales. From its chambers in rural southeastern Kentucky, it was most familiar with the tone and content of public discourse. It could read letters to local newspapers, see the proliferation of "Keep The Ten Commandments" yard signs and hear the statements of public officials. These cases were front-page news. The district court was thus best suited to gauge whether, in light of these factors, the litigation history and the displays' content, the Counties "nevertheles[s] ask[ed it] to pretend that [it] d[id] not recognize what every [one else] understood clearly – that this [display was] about [posting the Ten Commandments]." *Santa Fe*, 530 U.S. at 315.

The petitioners passionately want to display the Ten Commandments at the seat of county government precisely because of their religious content and meaning. They candidly expressed their passion earlier in this litigation. But their candor thwarted them from desired

ends. They have strategically elected to mute their passion; they now seek to justify the display despite its religious significance, rather than because of it. But justifying governmental display of core religious text as secular disserves both religion and government. "By attributing to the Commandments a legal significance they do not have," the Counties "inflat[e] the importance of the Commandments to" non-Jews and non-Christians. BJC *Van Orden* Br. at 23. "But by emphasizing this false source of significance," the Counties "necessarily distor[t] and concea[l] the Commandments' true significance in the faiths to which they are sacred." *Id.* The Counties thus manage "both to advance and inhibit religion at the same time – to advance one understanding of the sacred text, and thereby to inhibit another, more religious understanding of that text." *Id.*

There simply is no more secular purpose for the Counties' third displays than existed in *Stone*. Here, as there, the government's true purpose is to impermissibly advance religion.

2. Because the displays rest on the fundamentally flawed – and ultimately sectarian – premise that the Ten Commandments were a "foundational document" for this nation's governmental structure, and because a reasonable observer would understand that the Counties' changing displays were strategic litigation responses, the displays had the effect of endorsing religion.

Government action that has the effect of endorsing religion likewise violates the Establishment Clause. *See*

Allegheny, 492 U.S. at 592. At issue is whether the "objective observer, acquainted with the text, legislative history and implementation of the [action], would perceive it as a state endorsement" of religion. *Wallace*, 472 U.S. at 38 (Justice O'Connor, concurring); *Allegheny*, 492 U.S. at 593. The endorsement test thus ensures "that government . . . not . . . conve[y] a message that religion or a particular religious belief is favored or preferred." *Id.* at 627 (O'Connor, J., concurring in part and concurring in the judgment). Here, the content, context and location of the Counties' displays reveal endorsement.

As detailed above, the content of the displays expresses a subjective view of the influence of a particular religious text on American law and government. It is not an objective statement of verifiable fact. It is not a statement supported by history. It is not a statement evident from the face of the displayed documents. And it is not a statement supported by evidence at the site. Section II.B.1.b detailed why the Counties' unsupported proclamation about the Ten Commandments' foundational role had the impermissible purpose of endorsing religion. For similar reasons, the displays have the impermissible effect of endorsing religion.

The reasonable observer will be familiar with the Counties' repeated efforts to post the Ten Commandments. That observer also will be familiar with the Counties' earlier announced purpose of demonstrating "America's Christian heritage." [Pet. App. 127a, 151a.] The reasonable observer will know that the Counties deemed current law to hold "that America is a 'Christian nation.'" [J.A. 1 #5 at 8-9, 28 #6 at 8-9 (citing *Church of the Holy Trinity*, 143 U.S. at 471)] The observer will know that the Counties proclaimed the Ten Commandments as "*the* precedent

legal code of the Commonwealth" and "*the* central historic legal document of the state . . ." [J.A. 1 #5 at 8-9, 28 #6 at 8-9 (emphasis added)], and erected displays highlighting the religious nature of the Ten Commandments. Finally, the reasonable observer will know that the Counties now have declared the Ten Commandments to be "*the* foundation of our legal tradition," providing "*the* moral background of the Declaration of Independence," even though there is no historical support for those assertions.

The displays' context also has the effect of endorsing religion. The displays contained, in addition to the Ten Commandments, the text of American (or earlier Colonial or English) political documents and patriotic song lyrics and a picture of Lady Justice. To the reasonable observer, the displays thus equated core religious beliefs with America's political heritage, patriotism and liberty. As the courts below correctly concluded: "The reasonable observer will . . . understand that the counties promote that one religious code as being on a par with our nation's most cherished secular symbols and documents. This is endorsement." [Pet. App. at 45a.] *See Adland*, 307 F.3d 486-87 (linking Ten Commandments with symbols of American secular heritage "serves to heighten the appearance of government endorsement of religion"); *see also Books*, 235 F.3d at 307 ("placement of the American Eagle gripping the national colors at the top of the [Ten Commandments] monument hardly detracts from the message of endorsement; rather it specifically links religion . . . and civil government").

Nor is this display analogous to the holiday display cases. There, this Court assessed whether the inclusion of religious symbols in holiday displays impermissibly endorsed religion. In *Lynch*, this Court upheld a Christmas display containing a crèche among many purely

secular symbols, such as a Santa Claus house, lighted tree and candy-striped poles. *Id.*, 465 U.S. at 571. In *Allegheny*, by contrast, the Court struck down a display in which the crèche stood alone in a prime courthouse location. *Id.*, 492 U.S. at 598-99. But the Court also upheld a display including a menorah along with a Christmas tree and a sign saluting liberty. *Id.*, 492 U.S. at 614.

Lynch and *Allegheny* require tough line-drawing that has divided this Court. But those displays all involved symbols *related to one another and the seasonal holidays*; they did not include just secular and religious symbols. The crèche decisions and the principles that govern them have this in common: they address secular and religious symbols of Christmas in Christmas displays at Christmas time. And the "salute to liberty" decision involved the display of symbols related to different religions' December holidays and a sign seeming to celebrate pluralism. The cases cannot be understood to approve governmental display of a crèche in a non-Christmas setting, even if surrounded by secular symbols – for example, a Labor Day display celebrating workers.

By contrast, the Counties' displays are more like the Labor Day example – made permanent. As detailed above, the Ten Commandments are not related to the political and patriotic documents comprising the rest of the display. They did not "profoundly influence" or provide the "moral background" for our nation's founding documents. And they are not "the precedent legal code of the Commonwealth" or "the central historic legal document of the state." The Commandments indeed "stick out [of this display] . . . like a proverbial sore thumb." [Pet. App. 47a (citation omitted).][28]

[28] The United States' reliance on *Lynch* and *Allegheny* hinges, of course, on the accuracy of the displays' historical assertions. *See* U.S. Br. at 12-14. Because, as argued in § II.B.2.b, above, the Ten Commandments did not "profoundly influence" or serve as the "moral background" for our nation's founding documents, the displays are not simple "acknowledgements" of religious roots and are not analogous to Christmas displays. Moreover, even if the historical record is unclear, that lack of clarity undermines the United States' position, because the Counties are expressing their view about the disputed influence of one religious text. By contrast, there was no dispute in *Lynch* or *Allegheny* about the religious roots of Christmas.

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The displays' location also has the effect of endorsing religion. The Counties' courthouses are the seats of all three branches of county government. Citizens, including the individual respondents, pay taxes at the courthouse, renew licenses and automobile tags there, and engage in other routine civic business, including voting and jury service. That is undoubtedly why the McCreary County Fiscal Court ordered that "the display be posted in a very high traffic area of the courthouse." [Pet. App. 121a.] And it is why this Court has recognized that displays do not exist at the seat of government – a location so obviously under government control – without governmental approval. *See Allegheny*, 492 U.S. at 599-600.

Finally, last Term, in *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S.Ct. 2301 (2004), Justice O'Connor identified four factors that channel the endorsement analysis: history and ubiquity; absence of worship or prayer; absence of reference to particular religion; and minimal religious content. *Id.*, 124 S.Ct. at 2323-26 (O'Connor, J., concurring). These factors point toward endorsement here.

First, governmental Ten Commandments displays are relatively new and far less ubiquitous than the Pledge of Allegiance or national motto. *See* Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extreme But Missing the Liberty*, 118

Harv. L. Rev. 155, 236 (2004) ("there is no long and ubiquitous history of large monuments displaying the text of the Commandments . . ."). More to the point, there is *no* history of displaying the Ten Commandments *as a foundational document* for our nation's political and legal history and the Counties' displays are not ubiquitous. On the contrary, the Counties erected these displays in the course of litigation and any reasonable observer will understand that they are a strategic litigation response.[27]

Second, while the Ten Commandments are not worship or prayer in themselves, they have as their "purpose placing the [reader] in a penitent state of mind, or [are] intended to create a spiritual communion or invoke divine aid, [thus] stray[ing] from the legitimate secular purposes of solemnizing an event and recognizing a shared religious history." *Newdow*, 124 S.Ct. at 2324 (O'Connor, J., concurring). Indeed, this Court found this precise effect – "to read, meditate upon, perhaps to venerate and obey, the Commandments" – in *Stone*. *Id.*, 449 U.S. at 42.

Third, the Ten Commandments displays repeatedly refer to particular religions, as detailed in § I.B, by championing that document itself and by choosing text that reflects deep theological and historical rifts. Declaring the Ten Commandments to be the foundational document for our nation and the moral background of the Declaration of Independence necessarily favors those religions that revere the Ten Commandments. And because there is no generic, generally accepted text, choosing this version of

[27] The United States thus makes far too general a point when it describes "official acknowledgements" of religion's role in our history. *See* U.S. Br. at 10-12. These displays do not acknowledge religion's role generally, but specifically assert the Ten Commandments' "foundational role" – a role that history does not support.

the Ten Commandments necessarily favors some Protestants over Catholics, Jews and other Protestants. "[N]o religious acknowledgement could claim to be an instance of ceremonial deism if it explicitly favored one particular religious belief system over another." *Newdow*, 124 S.Ct. at 2326 (O'Connor, J., concurring).

Fourth, the Counties' displays have far more than "minimal" religious content. The displays contain fourteen to seventeen Biblical verses (depending on religions' numbering and organizing systems). They recite *the* central Jewish article of faith. They recite core religious beliefs of Christians and Jews. They capitalize the word "Lord" in every usage. They could not be more of a religious proclamation, as the reasonable observer surely knows.

CONCLUSION

In *Allegheny*, Justice Stevens suggested that the frieze depicting Moses holding symbolic Ten Commandments would be constitutional because dozens of other "great lawgivers" are depicted. *Id.*, 492 U.S. at 652-53 (Stevens, J., concurring in part and dissenting in part). But the Counties' courthouse displays are not displays of "lawgivers." They are not a sampling of great moral codes. The only other "codes" are those establishing the political framework of our republic. Nor do the Counties expose citizens to the teachings of the world's great cultures and religions, for they display only one Protestant version of the Ten Commandments.

McCreary and Pulaski counties have each posted three different Ten Commandments displays in their courthouses. They initially trumpeted their celebration of Christianity and highlighted the religious components of their displays. They repeatedly have sought to link the Ten Commandments to the formation of America, calling them

the precedent legal code, *the* central historic legal document of the state, *the* foundation of our legal tradition, and as providing *the* moral background of the Declaration of Independence. The purpose and effect of the Counties' actions throughout this litigation, including in posting their third displays, clearly has been to advance religion. For this reason, the third displays violate the First Amendment's Establishment Clause and this Court should affirm the Sixth Circuit's judgment.

Respectfully submitted,

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